Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-1213

LEWIS CLINTON PIKE, Petitioner

v.

UNITED STATES OF AMERICA

ON

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF OF PETITIONER

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TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

Petitioner respectfully files this, his reply brief addressed to arguments first raised in the brief in opposition to the petition for writ of certiorari:

I

The Government argues (pages 6-8, Opposition Brief) that "the task of identifying the reason for petitioner's failure to refute the accusation inherent in his co-defendant's statement to him is not compounded by any valid explanations other than culpability". It was properly admitted over timely objection, argues the Government, because at the time petitioner stood mute in the face of the statement, he was not "undergoing custodial interrogation" but was merely "being detained and searched" by an F.B.I. agent.

Curiously enough, the Government reasons since the F.B.I. agent had **not** informed petitioner of his right to remain silent, the fact that he did so was not an exercise of his Fifth Amendment right but was, instead, evidence of guilt. The Government's argument boils down to this: Detention for search does not excuse a citizen from refusing to answer an accusatory statement or question, and his failure to do so can be used against him.

The Government does not explain the practical difference between "detention for search" and "custodial interrogation". Logic tells us each can be equally employed to obtain evidence from the citizen to be used against him, and the employment of each is limited by the Fourth and Fifth Amendments.

As Mr. Justice Powell said in **United States v. Watson** (1976) 96 S. Ct. 820:

> "Since the Fourth Amendment speaks equally to both searches and seizures, and since an arrest, the taking hold of one's person is quintessentially a seizure, it would seem that the constitutional provision would impose the same limitations upon arrests that it does upon searches."

In **Miranda,** the Court settled the question of the right of a citizen to remain silent during "custodial interrogation". The question of whether the same right attends the citizen who is detained for search is yet to be answered by this Court and there is division among the Circuits on it. Logic and the apparent weight of authority in the Circuits seem to be that the right to decline to be a witness against ones' self is constitutionally assured to one in custody, regardless of whether the custody is an arrest in the traditional sense followed by incarceration and prosecution or is a detention for search. Whether the police investigation is being accomplished by custodial interrogation or by search or by both should not matter in face of Fourth and Fifth Amendment rights.

Yet, this substantial constitutional question has not been settled by this Court, and it should be. There is division among the Circuits on it.

The District of Columbia Court of Appeals has twice held that the questioning of a person whose movement is restricted during a police search does not constitute "custodial interrogation" within the meaning of **Miranda: Tyler v. United States,** D. C. App. 298 A. 2d 224; **Wells v. United States** D. C. App., 281 A. 2d 226.

But the Fifth Circuit in **Brown v. Beto,** 468 F 2d 1284, held that one who was present during a search of his store under a warrant was in custody rendering inadmissable a self-incriminatory statement made by him to the searchers prior to receipt of the **Miranda** warnings.

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Please compare this with the Governments argument that after the investigation had focused upon him, petitioner's **silence** while being detained and searched was made admissable and probative by the **absence** of a **Miranda** warning.

This argument can be correct only if the Court holds that detention for search is not such "custody" as to entitle the citizen to protection of the Fifth Amendment right of silence while detained for the search. To borrow the words* of Mr. Justice Marshall, the theory "has an odd sound to it".

The more reasonable holding, we submit, and the one comporting more with the spirit as well as the letter of the Fifth Amendment is that the "tacit admission" rule does not apply in search detention situations, just as it does not apply in other custodial investigations. The rationale that a search detention is any less an incursion upon the right to remain silent than an interrogative detention is difficult to fathom.

We are fortified not only by **Brown v. Beto,** supra, but also by **U. S. v. Ghiz,** C.A.W. Va. 1974, 491 F. 2d 599 and **U. S. v. King,** C.A. N.M. 1973, 485 F. 2d 353, together with several well reasoned state court decisions holding that the Fifth Amendment proscribes evidence of accuseds' silence in face of accusations made to him in a custodial situation: **People v. Bobo,** Mich. 1973, 212 N. W. 2d 190; **Davidson v. State,** Okl. Cr. 1974, 521 P. 2d. 1379; **State v. Caster,** N. C. 1974, 204 S. E. 2d 848.

The United States contends (Opposition Brief 8, footnote 6) "this case does not involve the situation presented in **Doyle v. Ohio,** No. 75-5014 and **Wood v. Ohio,** No. 75-5015 (both cases argued February 23, 1976). Consequently, we do not believe that the present petition should be held pending a decision in **Doyle** and **Wood.**"

This is true, argues the United States, because "Petitioner was not undergoing custodial interrogation—and had not therefore been advised in accordance with **Miranda v.**

*Fischer v. United States, 96 S. Ct. 1569, 1590 (1976)

Arizona, 384 U. S. 436, when he failed to respond to his co-defendants' statement."

This contention begs the point. The right not to be compelled to witness against ones' self owes its origin not to **Miranda,** but to the Fifth Amendment. **Miranda** simply protects and reinforces the right, which is not lost due to absence of a **Miranda** warning.

Doyle and Wood differ from this case most materially in that their failure to disclose their alibi at time of their arrest was used against them to attack their credibility as witnesses in their own defense. Here, Petitioner Pike exercised his right to remain silent throughout. Should it be held that **Doyle** and **Wood,** having elected to testify at their trials, could properly be shown to have remained silent at their arrest as going to their credibility as witnesses, this would not dispose of the case sub judice for here the petitioner has consistently insisted on his Fifth Amendment right not to be compelled to witness against him. His credibility as a witness is not an issue.

On the other hand, if the Court decides in favor of **Doyle** and **Wood** on their question of whether the silence of an arrestee is a permissable exercise of Fifth Amendment right for which he cannot be penalized, then these cases should be authority for reversal of the case sub judice.

To this extent, we think this case is intertwined with **Doyle** and **Wood,** but more to the point in disposing of this petition is the clear language of the Court in **Miranda:**

> "In accord with our decision today, it is impermissable to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation." 384 U. S. at 468, n. 37.

We simply petition the Court to apply this interpretation

of a Constitutional right broadly enough to apply its protection to a custodial situation involving a search on the same basis as a traditional arrest. For practical purposes, they are the same, both being investigation procedures involving detention of the citizen.

II

Under the restrictions of Supreme Court Rule 24(4), we can only address the Court in this reply Brief to arguments first raised in the brief in opposition. Of course, in confining ourselves to answering the Government's argument first raised relative the Fifth Amendment right to remain silent while being detained and searched, the petitioner does not retreat from or abandon any of the grounds urged in the Petition for Writ of Certiorari. The Government does not dispute that the question here replied to, as well as others in the petition, presents a conflict between the Circuits of substantial constitutional matters which have not been, but ought to be, resolved by the Court.

The Governments Brief in Opposition is directed mainly to contentions about the merits of the case and the facts involved. These issues can be met fully and four-square only if the writ is granted, the record sent up, and the parties are both heard fully on the facts and the law arising therefrom.

CONCLUSION

We respectfully submit that it is without dispute the petition sub judice presents substantial constitutional questions on which there is a conflict between the Circuits that has not been, but ought to be settled by the Supreme Court. This case particularly presents the question of whether a citizen detained for search has the Fifth Amendment right to remain silent in face of accusatorial statements.

We renew our prayer: Let the Writ of Certiorari be granted.

Respectfully submitted this 24th day of May, 1976.

George E. Trawick
of Counsel for Petitioner

PROOF OF SERVICE

I, George E. Trawick, one of the attorneys for Lewis Clinton Pike, Petitioner herein, and a Member of the Bar of the Supreme Court of the United States, hereby certify that, on the 24 day of May, 1976, I served copies of the foregoing motion on the United States by delivering the same to: Hon. Robert H. Bork, Solicitor General, Department of Justice, Washington, D. C. 20530; Hon. Richard L. Thornburgh, Assistant Attorney General; Hon. Jerome M. Feit and Hon. John J. Klein, Attorneys, Department of Justice, Washington, D. C. 20530.

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